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No. 98-384

FILED
NOV 2 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

NORTHERN STATES POWER COMPANY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR THE UTILITY RESPONDENTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

34 pp

QUESTION PRESENTED

Whether the court of appeals properly granted limited mandamus relief to enforce its final judgment in *Indiana Michigan Power Co. v. Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996), in which the court construed the Department of Energy's statutory obligations under Section 302(a)(5)(B) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10222(a)(5)(B) (1994).

RULE 29.6 LISTING

Pursuant to Supreme Court Rule 29.6, respondents joining in this Brief in Opposition (hereafter "Utility Respondents") list their respective parent companies and nonwholly owned subsidiaries as follows:

1. Respondent Northern States Power Company has no parent or nonwholly owned subsidiaries.

2. The parent company of respondent Florida Power and Light Company ("FPL") is FPL Group, Inc. FPL has no nonwholly owned subsidiaries.

3. Respondent Duke Energy Corporation, formerly known as Duke Power Company has no parent and the following nonwholly owned subsidiaries: Flo Trend Systems, Inc. and TEPPCO Partners, L.P.

4. Respondent Vermont Yankee Nuclear Power Corporation has no parent or nonwholly owned subsidiaries.

5. Respondent Niagara Mohawk Power Corporation has no parent and one nonwholly owned subsidiary, Canadian Niagara Power Company, Ltd.

6. The parent company of respondents GPU Nuclear, Inc., Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company is GPU, Inc. These respondents have no nonwholly owned subsidiaries.

7. The parent company of respondent Wisconsin Public Service Corporation is WPS Resources Corporation. Wisconsin Public Service Corporation has no nonwholly owned subsidiaries.

8. The parent company of respondent Union Electric Company, d/b/a AmerenUE, is Ameren Corporation. Union Electric Company has one nonwholly owned subsidiary, Electric Energy, Inc.

9. The parent company of respondent Detroit Edison Company is DTE Energy Company. Detroit Edison Company has no nonwholly owned subsidiaries.

10. The parent company of respondent Public Service Electric and Gas Company is Public Service Enterprise Group Incorporated. Public Service Electric and Gas Company has the following nonwholly owned subsidiaries: Enterprise Diversified Holdings Incorporated and PSE&G Fuel Corporation.

11. The parent company of respondent Florida Power Corporation is Florida Progress Corporation. Florida Power Corporation has one nonwholly owned subsidiary, Florida Capital Holdings, Inc.

12. The parent company of respondent Kansas Gas and Electric Company is Western Resources, Inc. Kansas Gas and Electric Company has no nonwholly owned subsidiaries.

13. Respondent Wolf Creek Nuclear Operating Corporation has no parent or nonwholly owned subsidiaries.

14. Respondent Kansas City Power & Light Company has no parent or nonwholly owned subsidiaries.

15. Respondent Kansas Electric Power Cooperative, Inc. has no parent or nonwholly owned subsidiaries.

16. The parent company of respondent Indiana Michigan Power Company is American Electric Power Company, Inc. Indiana Michigan Power Company has no nonwholly owned subsidiaries.

17. Respondent PECO Energy Company has no parent or nonwholly owned subsidiaries.

18. The parent company of respondent Virginia Electric and Power Company is Dominion Resources, Inc. Virginia Electric and Power Company has no nonwholly owned subsidiaries.

19. Respondent Baltimore Gas and Electric Company has no parent or nonwholly owned subsidiaries.

20. Respondent FirstEnergy Corp. (successor by merger to Centerior Energy Corporation) has no parent or nonwholly owned subsidiaries.

21. The parent company of respondent Duquesne Light Company is DQE, Inc. Duquesne Light Company has one nonwholly owned subsidiary, Duquesne Light Capital Ltd. Partnership.

22. The parent company of respondent MidAmerican Energy Company is MidAmerican Energy Holdings Company. MidAmerican Energy Company has no nonwholly owned subsidiaries.

23. The parent company of respondent Pennsylvania Power & Light Company is PP&L Resources, Inc. Pennsylvania Power & Light Company has no nonwholly owned subsidiaries.

24. The parent company of respondent Entergy Operations, Inc. is Entergy Corporation. Entergy Operations, Inc. has no nonwholly owned subsidiaries.

25. The parent company of respondent Texas Utilities Electric Company is Texas Utilities Company.

Texas Utilities Electric Company has no nonwholly owned subsidiaries.

26. Respondent Carolina Power & Light Company has no parent or nonwholly owned subsidiaries.

27. The parent company of respondent Commonwealth Edison Company is Unicom Corporation. Commonwealth Edison Company has no nonwholly owned subsidiaries.

28. Respondent Boston Edison Company has no parent or nonwholly owned subsidiaries.

29. The parent company of respondent Southern Nuclear Operating Company is the Southern Company. Southern Nuclear Operating Company has no nonwholly owned subsidiaries.

30. The parent company of respondent Wisconsin Electric Power Company is Wisconsin Energy Corporation. Wisconsin Electric Power Company has no nonwholly owned subsidiaries.

31. Respondent Omaha Public Power District has no parent or nonwholly owned subsidiaries.

32. Respondent Nebraska Public Power District has no parent or nonwholly owned subsidiaries.

33. Respondent Washington Public Power Supply System has no parent or nonwholly owned subsidiaries.

34. The parent company of respondent South Carolina Electric & Gas Company is SCANA Corporation. South Carolina Electric & Gas Company has no nonwholly owned subsidiaries.

35. The parent company of respondent IES Utilities Inc. is Interstate Energy Corporation. IES Utilities Inc. has no nonwholly owned subsidiaries.

36. Respondent Central Iowa Power Cooperative has no parent or nonwholly owned subsidiaries.

37. Respondent Corn Belt Power Cooperative has no parent or nonwholly owned subsidiaries.

38. The parent company of respondent Southern California Edison Company is Edison International. Southern California Edison Company has no nonwholly owned subsidiaries.

39. Respondent Dairyland Power Cooperative has no parent or nonwholly owned subsidiaries.

40. The parent company of respondents Northeast Utilities Service Company and North Atlantic Energy Service Corporation is Northeast Utilities. Northeast Utilities Service Company and North Atlantic Energy Service Corporation have no nonwholly owned subsidiaries.

41. The parent company of respondent Consolidated Edison Company of New York, Inc. ("Con Ed") is Consolidated Edison, Inc. Con Ed has one nonwholly owned subsidiary, Honeoye Storage Corporation.

42. The parent company of respondent Illinois Power Company is Illinova Corporation. Illinois Power Company has one nonwholly owned subsidiary, Illinois Power Fuel Company.

43. Respondent Rochester Gas and Electric Corporation has no parent or nonwholly owned subsidiaries.

44. The parent company of Respondent Pacific Gas and Electric Company is PG&E Corporation. Pacific Gas and Electric Company has one nonwholly owned subsidiary, Standard Pacific Gas Line Incorporated.

45. Respondent Maine Yankee Atomic Power Company has no nonwholly owned subsidiaries and the following parents: Central Maine Power

Company, Northeast Utilities, New England Power Company, Bangor HydroElectric Company, Maine Public Service Company, Cambridge Electric Light Company, Montaup Electric Company, and Central Vermont Public Service Corporation.

46. Respondent Connecticut Yankee Atomic Power Company has no nonwholly owned subsidiaries and the following parents: Northeast Utilities, New England Power Company, BEC Energy, The United Illuminating Company, Central Maine Power Company, Cambridge Electric Light Company, Montaup Electric Company, and Central Vermont Public Service Corporation.

47. Respondent Yankee Atomic Electric Company has no nonwholly owned subsidiaries and the following parents: New England Power Company, Northeast Utilities, BEC Energy, Central Maine Power Company, Montaup Electric Company, Central Vermont Public Service Corporation, Commonwealth Electric Company, and Cambridge Electric Light Company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 LISTING	ii
TABLE OF AUTHORITIES	xi
STATEMENT OF THE CASE	1
A. DOE's Attempt to Evade Its Unconditional Obligation	2
B. The *Indiana Michigan* Decision	3
C. DOE's Disregard of the *Indiana Michigan* Mandate	4
D. The Enforcement Proceedings Below	5
ARGUMENT	7
I. THE GOVERNMENT'S PETITION CHALLENGING THE COURT OF APPEALS' ROUTINE AND PROPER EXERCISE OF ITS AUTHORITY TO ENFORCE ITS PRIOR, FINAL JUDGMENT DOES NOT PRESENT AN ISSUE WORTHY OF THIS COURT'S REVIEW AND IS UNTIMELY	7
A. The Court's Exercise of Its Authority To Enforce Its Prior, Unchallenged Mandate Was Appropriate and Does Not Present an Issue Worthy of Review	8
B. The Government's Petition is an Untimely and Improper Collateral Attack on the *Indiana Michigan* Decision	12
II. THE TUCKER ACT QUESTION PRESENTED BY THE GOVERNMENT IS INSUBSTANTIAL	15
A. The Court of Appeals' Enforcement of Its Prior Mandate Issued Pursuant to Its NWPA Jurisdiction Does Not Implicate the Tucker Act	15

TABLE OF CONTENTS—Continued

Page

B. The Tucker Act Issue Presented by the Government is Not Ripe for Review 19

III. THE PETITION DOES NOT PRESENT A QUESTION THAT WOULD RESOLVE THE PROBLEMS WITH THE NATION'S SNF DISPOSAL PROGRAM 21

CONCLUSION 22

TABLE OF AUTHORITIES

Cases: Page

Bowen v. Massachusetts, 487 U.S. 879 (1988) 15, 16
Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940) 13
Commonwealth Edison Co. v. Department of Energy, 877 F.2d 1042 (D.C. Cir. 1989) 11
Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998) 16
Functional Music, Inc. v. FCC, 274 F.2d 543 (D.C. Cir. 1958) 12
Graceba Total Communications, Inc. v. FCC, 115 F.3d 1038 (D.C. Cir. 1997) 12
Indiana Michigan Power Co. v. Department of Energy, 88 F.3d 1272 (D.C. Cir. 1996) 1
Insurance Corp. of Ireland v. Campagnie de Bauxites de Guinee, 456 U.S. 674 (1982) 13
Jackson v. Irving Trust Co., 311 U.S. 494 (1941) .. 13
MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) 12
Megapulse, Inc. v. Lewis, 672 F.2d 959 (D.C. Cir. 1982) 15, 17, 18
Northern States Power Co. v. Department of Energy, 128 F.3d 754 (D.C. Cir. 1997) 6
Office of Consumers' Counsel v. FERC, 826 F.2d 1136 (D.C. Cir. 1987) 8
Potomac Electric Power Co. v. ICC, 702 F.2d 1026 (D.C. Cir.), *supplemental op.*, 705 F.2d 1343 (D.C. Cir. 1983) 8
RCA Global Communications, Inc. v. FCC, 758 F.2d 722 (D.C. Cir. 1985) 12
Sharp v. Weinberger, 798 F.2d 1521 (D.C. Cir. 1986) 15
Tidewater Oil Co. v. United States, 409 U.S. 151 (1972) 21
Transohio Savings Bank v. Director, OTS, 967 F.2d 598 (D.C. Cir. 1992) 15, 17
United States v. New York Telephone Co., 434 U.S. 159 (1977) 8
United States v. United States District Court, 334 U.S. 258 (1948) 8

TABLE OF AUTHORITIES—Continued

	Page
United States v. USF&G, 309 U.S. 506 (1940)	13
United States v. Winstar Corp., 518 U.S. 839 (1996)	22
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 937 (1952)	21
Statutes, Rules and Regulations:	
10 C.F.R. pt. 961.11, Arts. II and VIII (1998)	2
5 U.S.C. § 702 (1994)	13
28 U.S.C. § 2101(c) (1994)	12
Nuclear Waste Policy Act of 1982	
Section 111, 42 U.S.C. § 10131 (1994)	2
Section 119(a), 42 U.S.C. § 10139(a) (1994)	3, 17
Section 119(c), 42 U.S.C. § 10139(c) (1994)	11
Section 302(a), 42 U.S.C. § 10222(a) (1994)	2
Section 302(a)(5)(B), 42 U.S.C. § 10222(a)(5)(B) (1994)	1, 2
Tucker Act, 28 U.S.C. § 1491(a)(1) (1994 & Supp. II 1996)	15
Supreme Court Rule 29.6	ii
Miscellaneous:	
60 Fed. Reg. 21,793 (1995)	3
61 Fed. Reg. 25,092 (1996)	5
DOE/EIS-0203-F, Department of Energy Programmatic Spent Nuclear Fuel Management and Idaho National Engineering Laboratory Environmental Restoration and Waste Management Programs Final Environmental Impact Statement (Apr. 1995)	5

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BRIEF IN OPPOSITION FOR THE UTILITY RESPONDENTS

STATEMENT OF THE CASE

The present case is a routine enforcement proceeding resulting from the Department of Energy's ("DOE") complete disregard of the court of appeals' decision in *Indiana Michigan Power Co. v. Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996). Pet. App. 27a-38a. In that case, the court of appeals held unequivocally that Section 302(a)(5)(B) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10222(a)(5)(B) (1994) ("NWPA") imposed on DOE an unconditional obligation to dispose of commercial utilities' spent nuclear fuel ("SNF") beginning no later than January 31, 1998, and remanded the matter to DOE to take action consistent with its unconditional obligation. Pet. App. 38a. DOE did not seek review by this Court. In the present

action, the court of appeals did nothing more than enforce its prior mandate by exercising its mandamus power—in what the government concedes to be limited fashion—to preclude DOE from attempting to turn the unconditional obligation required by the NWPA into a contingent one through the misuse of the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste ("Standard Contract").

The court's compliance order raises no jurisdictional issues under the Tucker Act, much less an issue worthy of review by this Court. Rather, the ostensible jurisdictional question presented by the government's petition is a transparent subterfuge by which the government seeks, one case and two years too late, to obtain review of the underlying decision in *Indiana Michigan* that DOE has an unconditional obligation to begin disposing of SNF not later than January 31, 1998. The *Indiana Michigan* decision was clearly correct and in any event is binding on the government. DOE's collateral attack on the *Indiana Michigan* decision—an attempt to accomplish indirectly what it failed to accomplish directly—should be seen for what it is and rejected.

A. DOE's Attempt to Evade Its Unconditional Obligation

Congress enacted the NWPA to codify the federal government's longstanding commitment to accept responsibility and provide for the timely disposal of commercial SNF. 42 U.S.C. § 10131 (1994). In return for the payment of billions of dollars in fees by nuclear utilities and other generators or owners of domestic commercial SNF, DOE was required to begin disposing of SNF by January 31, 1998. 42 U.S.C. § 10222(a)(5)(B). Pursuant to Section 302(a) of the NWPA, 42 U.S.C. § 10222(a) (1994), this essential quid pro quo is embodied in the Standard Contract. 10 C.F.R. pt. 961.11, Arts. II and VIII (1998).

DOE failed to meet most of the early milestones established by the NWPA (except for those relating to collecting fees from utilities). By 1995, the SNF program had fallen many years behind schedule. In May 1995, DOE advised the public, in its Final Interpretation of Nuclear Waste Acceptance Issues ("Final Interpretation"), that it "has become apparent that neither a repository nor an interim storage facility constructed under the Act will be available by 1998" and that it would not begin disposing of SNF until 2010 at the earliest. 60 Fed. Reg. 21,793, 21,793-21,794 (1995). The Final Interpretation also stated DOE's conclusion that its obligation to meet the January 1998 deadline imposed by the NWPA and the Standard Contract was conditioned on the existence of a final repository or interim storage facility. *Id.* at 21,794-95.

B. The *Indiana Michigan* Decision

A group of nuclear utilities and a separate group of States and state utility commissions filed petitions in the D.C. Circuit, pursuant to Section 119(a) of the NWPA, 42 U.S.C. § 10139(a) (1994), for review of DOE's Final Interpretation. In *Indiana Michigan*, the court of appeals unequivocally rejected DOE's position, holding that "[u]nder the plain language of the statute, the utilities anticipated paying fees 'in return for [which] the Secretary [of DOE]' had a commensurate duty . . . to begin disposing of the high-level radioactive waste or SNF by a date certain." Pet. App. 36a (first alteration in original). Therefore, the court held, DOE's obligation under NWPA § 302(a)(5)(B) to commence disposing of SNF no later than January 31, 1998, was "without qualification or condition." *Id.* The court explained that DOE's contrary interpretation "not only blue-pencils out the phrase 'not later than January 31, 1998,' but destroys the quid pro quo created by Congress." *Id.* The court rejected DOE's contention that "the [utilities'] payment of fees was for nothing." *Id.*

Although the court stated that it was then premature to determine the appropriate remedy because DOE had "not yet defaulted upon either its statutory or contractual obligation," the court concluded that "section 302(a)(5)(B) creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998." Pet. App. 37a-38a. The court remanded the case to DOE for further proceedings consistent with its opinion. *Id.* at 38a.

C. DOE's Disregard of the *Indiana Michigan* Mandate

As the court below observed, "DOE neither sought rehearing of [*Indiana Michigan*] nor petitioned the Supreme Court for further review." Pet. App. 5a. Instead, DOE simply ignored the decision. The D.C. Circuit succinctly described DOE's response as follows:

> After issuing our decision in *Indiana Michigan,* we would have expected that the Department would proceed as if it had just been told that it had an unconditional obligation to take the nuclear materials by the January 31, 1998, deadline. Not so. Quite to the contrary, the Department informed the utilities and the states that it would be unable to comply with the statutory deadline that this court had just reaffirmed. In late 1996, the utilities and the states initiated discussions with DOE and asked about the procedure and schedule that the Department would follow to comply with the court's decision. DOE responded to the utilities by announcing that it "will be unable to begin acceptance of spent nuclear fuel for disposal in a repository or interim storage facility by January 31, 1998." . . . The Department recognized that the delay would affect "large number[s]" of contract holders, but nonetheless expressed "uncertainty as to when DOE will be able to begin spent fuel acceptance." . . . The letter ended

> by cordially inviting "the views of all contract holders on how the delay can best be accommodated."

Id. (citations omitted).[1]

D. The Enforcement Proceedings Below

In response to DOE's recalcitrance, on January 31, 1997, the Utility Respondents, States and state commissions filed petitions in the court seeking the exercise of the court's mandamus enforcement jurisdiction to compel DOE's compliance with its unconditional NWPA obligation and with the court's prior mandate in *Indiana Michigan*. During the pendency of those proceedings, and despite the fact that no utility had sought any relief from DOE under the Standard Contract, on June 3, 1997, DOE unilaterally issued a "preliminary determination" that its failure to meet the January 31, 1998 deadline was an "unavoidable delay" within the meaning of Article IX.A of the Standard Contract. Pet. App. 6a. DOE therefore asserted that it had no obligation to pay for the damages suffered by the utilities as a result of DOE's default. *Id.* The "preliminary determination" focused on DOE's excuses for failing to establish the geologic reposi-

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[1] DOE's failure to make any effort to comply with the court's mandate was not based on any lack of ability to transport or store SNF. During the past four decades, DOE and its predecessor agencies have transported, received, stored, and reprocessed more than 100,000 metric tons of civilian and military SNF, and DOE continues to accept civilian-generated SNF from nations around the world. *See* 61 Fed. Reg. 25,092, 25,095-96 (1996); DOE/EIS-0203-F, Department of Energy Programmatic Spent Nuclear Fuel Management and Idaho National Engineering Laboratory Environmental Restoration and Waste Management Programs Final Environmental Impact Statement (Apr. 1995), excerpts of which were included as attachment 11 to the Utility Petitioners' Petition for a Writ of Mandamas filed in No. 97-1064. Consistent with these facts, at oral argument in the case below the government's counsel admitted that DOE was physically able to meet the statutory deadline. Transcript of Oral Argument dated Sept. 25, 1997, at 29-30, *Northern States Power Co. v. Department of Energy*, (D.C. Cir.) (No. 97-1064).

tory called for by the NWPA, even though the court of appeals in *Indiana Michigan* had specifically rejected DOE's position that its obligation to begin disposing of SNF by January 31, 1998, was contingent upon the existence of such a repository. *Id.* at 12a-13a.

On November 14, 1997, the court of appeals granted what the government characterizes as "limited mandamus relief." Pet. at 11; *see Northern States Power Co. v. Department of Energy*, 128 F.3d 754 (D.C. Cir. 1997); Pet. App. 1a-4a. The court strongly reaffirmed its decision in *Indiana Michigan*, holding that "the NWPA requires DOE, 'in return for the payment of fees' to begin disposing of the materials 'not later than January 31, 1998.'" *Id.* at 8a. The court observed that, although the utilities had fulfilled their part of the statutory bargain, DOE had simply brushed aside its corresponding duty. *Id.* Accordingly, the court issued a narrowly tailored writ of mandamus "precluding DOE from excusing its own delay on the grounds that it has not yet prepared a permanent repository or interim storage facility." *Id.* at 14a. The court concluded that such an enforcement order was necessary in light of "DOE's repeated attempts to excuse its delay" on such grounds, notwithstanding the court's rejection of those arguments in *Indiana Michigan*. *Id.* at 13a. As the court explained, "DOE cannot now render its obligation contingent, and free itself of the costs caused by its delay, by advancing the same failed position that we rejected before." *Id.*

DOE petitioned for rehearing, contending that under the Tucker Act, 28 U.S.C. § 1491, the court of appeals had no jurisdiction to issue an order regarding the proper application of the Unavoidable Delays clause of the Standard Contract. The court denied DOE's petition, pointing out that it had not ruled on a contract claim but rather on a statutory issue:

> [W]e merely prohibited the DOE from implementing an interpretation [of the Unavoidable Delays clause that would place it in violation of its duty under the NWPA to assume an unconditional obligation to begin disposal by January 31, 1998. *The statutory duty to include an unconditional obligation in the contract is independent of any rights under the contract.* The Tucker Act does not prevent us from exercising jurisdiction over an action to enforce compliance with the NWPA.

Pet. App. 19a (emphasis added).

Pursuant to the *Northern States* decision, ten utilities filed breach of contract actions against the government in the Court of Federal Claims, seeking money damages for DOE's breach of its NWPA-mandated unconditional obligation in the Standard Contract. One utility has filed a request with DOE for an equitable adjustment pursuant to the Avoidable Delays clause of the Standard Contract, Article IX.B. Five utilities have filed a new action in the D.C. Circuit, pursuant to that court's "original and exclusive jurisdiction" under Section 119(a) of the NWPA, 42 U.S.C. § 10139(a), alleging constitutional, statutory, and contractual violations and seeking injunctive relief and damages.

ARGUMENT

I. THE GOVERNMENT'S PETITION CHALLENGING THE COURT OF APPEALS' ROUTINE AND PROPER EXERCISE OF ITS AUTHORITY TO ENFORCE ITS PRIOR, FINAL JUDGMENT DOES NOT PRESENT AN ISSUE WORTHY OF THIS COURT'S REVIEW AND IS UNTIMELY

The decision below has no significance independent of *Indiana Michigan*. The *Indiana Michigan* decision resolved the substantive question of whether the NWPA required DOE to undertake an unconditional obligation to dispose of SNF beginning no later than January 31, 1998, stating unequivocally that DOE did have such an

obligation. In the present proceedings, the appellate panel merely determined that its earlier decision in *Indiana Michigan* precluded DOE from treating its failure to meet the January 1998 deadline as unavoidable, and selected an appropriate mechanism for enforcing DOE's compliance with that mandate. There is nothing extraordinary in that enforcement process that requires this Court's review. Moreover, the government's attempt to attack the final, unappealed decision in *Indiana Michigan* is untimely.

A. The Court's Exercise of Its Authority To Enforce Its Prior, Unchallenged Mandate Was Appropriate and Does Not Present an Issue Warranting Review

There is nothing unusual or improper about the court of appeals' exercise of its inherent jurisdiction to enforce its prior mandate in *Indiana Michigan*. *See, e.g., United States v. New York Tel. Co.*, 434 U.S. 159, 172-73 (1977) ("This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained . . . ."); *United States v. United States Dist. Court*, 334 U.S. 258, 264 (1948); *Office of Consumers' Counsel v. FERC*, 826 F.2d 1136, 1140 (D.C. Cir. 1987); *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1032 (D.C. Cir.), *supplemental op.*, 705 F.2d 1343 (D.C. Cir. 1983). The government's contention that the D.C. Circuit had no jurisdiction to enforce its prior mandate because the Tucker Act gives the Court of Federal Claims exclusive jurisdiction over claims arising under the Standard Contract simply begs the question. As described below, neither *Indiana Michigan* nor *Northern States* involved a damages claim arising under the Standard Contract. Rather, these cases interpreted and enforced DOE's obligation under the NWPA to assume an unconditional obligation to dispose of SNF. The limited mandamus relief issued by the D.C. Circuit in this case precluded DOE

from misusing a provision of the Standard Contract in derogation of that statutory obligation.[2]

The government's attempt to cast doubt on the court's exercise of its jurisdiction in *Indiana Michigan* (Pet. at 17 n.9) should be rejected. Contrary to the government's argument, the court of appeals has never held that DOE's unconditional obligation is solely contractual. Rather, in the case below the court reiterated in the strongest terms that "[t]he contractual obligations created consistently with the *statutory contemplation* leave no room for DOE to argue that it does not have a clear duty to take the SNF . . . by the deadline imposed by Congress." Pet. App. 9a (emphasis added); *see also id.* at 13a ("We held in *Indiana Michigan* that the NWPA imposes an unconditional duty on DOE to take the materials by 1998."). The government's reliance on the court's May 5, 1998 Order denying rehearing is misplaced. The court simply noted that because the NWPA required DOE to include its unconditional obligation in the Standard Contract, DOE could not be ordered to perform the obligation but rather had the choice of performing or of paying the additional costs incurred by Standard Contract holders as a result of its failure to perform. *Id.* at 18a. The court made

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[2] The government inexplicably cites its pending petition for a writ of certiorari in *FCC v. Iowa Utilities Board*, 97-1519, in support of its attack on the court's exercise of mandamus authority. Pet. at 19 n.10. That case involves an entirely different statutory scheme (the Telecommunications Act of 1996), and disposition of the jurisdictional question presented for review in *Iowa Utilities Board* would shed no light on the issue presented here regarding the effect of the Tucker Act on the scope of the court's jurisdiction under the NWPA. Moreover, when the government filed the petition in question, this Court had already granted review of the Eighth Circuit's underlying decision on which the subsequent mandamus order was based. Here, by contrast, the government neither sought nor obtained review of the underlying decision in *Indiana Michigan*, which has long since become final and binding. Accordingly, there is no question in this case about the propriety of the mandate that the court of appeals enforced in the decision below.

clear that DOE's attempt to interpret the Standard Contract "as imposing only a contingent disposal obligation . . . would place the DOE in violation of its *statutory* duties under the [NWPA], which required it to undertake an unconditional obligation." *Id.* at 17a (emphasis added); *see also id.* at 18a ("*Northern States* describes the nature of the DOE's obligation, which was created by the NWPA and undertaken by the DOE under the Standard Contract"). In any event, the court's exercise of its jurisdiction in *Indiana Michigan* is now beyond challenge and establishes the validity of the mandamus order issued in a case that had come within the court's jurisdiction the year before. Pet. at 18.

Similarly, the government's challenge to the merits of the court of appeals' decision below (Pet. at 20-22) not only is irrelevant to the question of whether the court had jurisdiction, which is the sole question the government presents for review, but depends again on the government's mischaracterization of the decision as one involving a purely contractual claim. The government takes issue with the court's "apparent premise" that "DOE's failure to fulfill a contractual obligation *necessarily* requires the payment of damages for any losses incurred as a result of the breach." Pet. at 20 (emphasis in original). As has been seen, however, the court did not rule that DOE failed to fulfill a mere contractual obligation. Rather, the court held that DOE failed to fulfill a *statutory* duty under the NWPA, "which required [DOE] to undertake an unconditional obligation" in the Standard Contract. Pet. App. 17a. As the court emphasized in rejecting DOE's rehearing petition, "The statutory duty to include an unconditional obligation in the contract is independent of any rights under the contract." *Id.* at 19a. Thus, the court properly concluded that DOE could not abrogate its statutorily-mandated unconditional obligation by relying on a contractual provision to excuse itself both from

performing its obligation and from compensating the utilities for damages resulting from its failure to perform.[3]

Because the court of appeals' ruling so clearly involves a statutory and not just a contractual claim, the government attempts to preserve its tenuous jurisdictional argument by serving up an "alternative explanation" of the decision as a holding that the Standard Contract's Unavoidable Delays clause is on its face inconsistent with the NWPA. Pet. at 23. Moreover, the government's "alternative argument" that the D.C. Circuit lacked jurisdiction because the utilities failed to file a petition for review within 180 days of the 1983 promulgation of the Standard Contract, as required by NWPA § 119(c), 42 U.S.C. § 10139(c) (1994), is without merit.

The Utility Respondents did not contend, and the court of appeals did not find, that the Unavoidable Delays clause was statutorily invalid on its face. Rather, the court of appeals held that the Unavoidable Delays clause, "insofar *as it is applied* to DOE's failure to perform by 1998, is inconsistent with DOE's statutory obligation to assume an unconditional duty." Pet. App. 14a (emphasis added). In so holding, the court of appeals did not purport to interpret a contractual provision, but rather determined that any interpretation of the Unavoidable Delays clause by DOE to excuse its failure to meet the January 31, 1998 deadline is precluded by the NWPA. There can be no serious question that the court had jurisdiction to interpret the *statute* as well as its prior ruling in *Indiana Michigan* in order to make that determination.[4]

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[3] Notwithstanding the government's hyperbolic arguments (Pet. at 20-21 and n.12), the logic of the court of appeals' ruling neither nullifies the Unavoidable Delays provision of the Standard Contract nor exposes DOE to damages for truly unavoidable delays in particular shipments of SNF once DOE actually commences the disposal program. The essence of the court's decision is that DOE's failure to begin the program by the congressionally-mandated deadline cannot be fully excused under any circumstances as "unavoidable."

[4] The government concedes that in *Commonwealth Edison Co. v. Department of Energy*, 877 F.2d 1042 (D.C. Cir. 1989), it endorsed

Moreover, the government ignores the fundamental principle that a party aggrieved by the application of an agency rule may challenge that application even though the statutory time limit for judicial review of the promulgation of the rule has passed. *See, e.g., Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1040-41 (D.C. Cir. 1997); *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1189-91 (D.C. Cir. 1985); *RCA Global Communications, Inc. v. FCC*, 758 F.2d 722, 730-31 (D.C. Cir. 1985); *Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958). This principle applies with particular force here. It is absurd for the government to suggest that in 1983 the utilities could and should have foreseen that fifteen years later DOE not only would default on its statutorily-imposed deadline, but also would attempt to avoid the consequences of its default by misapplying the Standard Contract to excuse its programmatic failure. *See RCA Global Communications*, 758 F.2d at 731.

B. The Government's Petition is an Untimely and Improper Collateral Attack on the *Indiana Michigan* Decision

Having failed to pursue further review in *Indiana Michigan*, the government is statutorily precluded from challenging either the D.C. Circuit's exercise of jurisdiction in that case (which provides the basis for the court's exercise of its All Writs Act power) or the panel's substantive rulings. 28 U.S.C. § 2101(c) (1994). The government may not avoid the time limits imposed by 28 U.S.C. § 2101(c) by collaterally attacking the D.C. Circuit's holding in *Indiana Michigan* under the guise of

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the court of appeals' jurisdiction to rule on a challenge to DOE's interpretation of a Standard Contract provision, but now claims that this was a mistake. Pet. at 23 n.13. In fact, the *Commonwealth Edison* decision was clearly correct in this respect, and the government's present attempt to reverse field is both baseless and nine years too late.

cnallenging the court of appeals' authority to compel compliance with its prior mandate. The court's assumption of jurisdiction in *Indiana Michigan* to construe DOE's obligations under the NWPA, from which the government made no attempt to seek review, bars the government as a matter of *res judicata* from challenging the court's subsequent exercise of its enforcement jurisdiction in that respect. *See, e.g., Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376-78 (1940); *Insurance Corp. of Ireland v. Compagnie de Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982) ("A party that has had an opportunity to litigate the question of subject matter jurisdiction may not reopen that question in a collateral attack upon an adverse judgment.").[5]

A collateral attack, however, is precisely what the government is attempting to achieve. Indeed, the government concedes that "[t]he Court's decision to grant mandamus relief . . . was based on . . . its conclusion, drawn from the *Indiana Michigan* opinion . . . ." Pet. at 21 n.12. In order to obfuscate the fact that its true target is *Indiana Michigan*, the government states the "Question Presented" to this Court as whether the court's limited mandamus order enforcing its decision in *Indiana Michigan* impermissibly intrudes upon the exclusive Tucker Act jurisdiction of the Court of Federal Claims. But even the government's formulation of the question presented implicitly challenges the holding in *Indiana Michigan*. Application

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[5] The one exceedingly narrow exception to this basic rule of judicial finality is "where the issue is the waiver of immunity." *United States v. USF&G*, 309 U.S. 506, 514 (1940). In this case, there can be no legitmate question that the government clearly has waived its immunity from suits relating to DOE's failure to comply with the NWPA. *See* 5 U.S.C. § 702 (1994). The government disputes only the proper forum in which the particular challenge should be heard. The courts have consistently declined to extend *USF&G* beyond its facts. *See, e.g., Jackson v. Irving Trust Co.*, 311 U.S. 494, 499-500 (1941) (declining to extend *USF&G* to permit collateral attacks on jurisdictional facts).

of the Unavoidable Delays clause to a programmatic failure to begin accepting SNF by the statutory deadline, regardless of the justification for its application, expressly relieves the government of the "unconditional duty on DOE to take the materials by 1998" that the court in *Indiana Michigan* found to exist. Pet. App. 13a. That this is the government's true intent is revealed in its expression of "substantial doubt" as to whether the court of appeals properly exercised its NWPA jurisdiction in *Indiana Michigan*. Pet. at 17 n.9.

The government, for obvious reasons, does not directly present as a question to be decided by this Court the necessary preliminary issue of whether the court below misconstrued the meaning of its own prior final decision. To do so would plainly involve nothing more than a collateral attack on the merits of the final judgment in *Indiana Michigan*. Furthermore, even had the government's petition presented the question of the D.C. Circuit's construction of its own mandate, that question would be unworthy of review by this Court. The government itself has made that point in its opposition to the petition for a writ of certiorari filed by the States and state utility commissions seeking review of the decision below on the ground that the court did not go far enough in enforcing DOE's statutory obligations:

> Any inconsistency between that holding [in the court's May 5, 1998 Order] and some of the reasoning in prior opinions issued by the same panel of the same court of appeals does not warrant review by this Court.

Brief for Respondents in Opposition dated Oct. 1998, at 13, *Michigan, et al. v. Department of Energy, et al.* (S. Ct.) (No. 98-225). The government's position on the States' petition applies with at least equal force to the government's own petition here and demonstrates that the

government has not raised an issue worthy of further review.[6]

II. THE TUCKER ACT QUESTION PRESENTED BY THE GOVERNMENT IS INSUBSTANTIAL

A. The Court of Appeals' Enforcement of Its Prior Mandate Issued Pursuant to Its NWPA Jurisdiction Does Not Implicate the Tucker Act

Even if the government's arguments are not time-barred, they should be rejected. The court of appeals correctly applied the well-established rule that the Tucker Act does not prohibit the federal district courts or regional courts of appeals from examining and interpreting government contracts, or even from granting relief that may affect rights under government contracts, in the course of deciding statutory and constitutional claims otherwise within their jurisdiction. *See Bowen v. Massachusetts*, 487 U.S. 879 (1988); *Transohio Savings Bank v. Director, OTS*, 967 F.2d 598, 609-11 (D.C. Cir. 1992); *Sharp v. Weinberger*, 798 F.2d 1521, 1522 (D.C. Cir. 1986); *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982) (the Court of Federal Claims "certainly has no corner on the power to consider contract-related issues arising in other actions"). The court's routine application of that rule to the facts of this case does not present an issue warranting this Court's attention.

The Tucker Act waives the government's sovereign immunity to be sued in the Court of Federal Claims for money damages for claims arising under the Constitution, statute, or contract. 28 U.S.C. § 1491(a)(1) (1994 &

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[6] The States' petition raises different issues than the question presented by the government, including whether the court below should have ordered DOE to begin disposing of SNF by the January 31, 1998 deadline. Consequently, if the Court should choose to grant the States' petition, there is no corresponding reason to grant review of the technical and untimely jurisdictional issue that the government has raised in the present petition.

Supp. II 1996). In previous decisions, this Court has exhaustively addressed the interplay between the Tucker Act and the Administrative Procedure Act ("APA") and the availability of equitable relief in courts other than the Court of Federal Claims. *Eastern Enters. v. Apfel*, 118 S. Ct. 2131 (1998); *Bowen v. Massachusetts*, 487 U.S. 879 (1988). In particular, the Court in *Bowen* rejected an argument virtually identical to the government's position here. The government argued in *Bowen* that the federal district courts had no jurisdiction under the APA to review decisions by the Secretary of Health and Human Services denying Medicaid reimbursements to States, because the Tucker Act gave the Claims Court (now the Court of Federal Claims) exclusive jurisdiction over claims against the United States for monetary relief. *Id.* at 882-83. The Court, construing Sections 702 and 704 of the APA, concluded that complaints seeking injunctive and declaratory relief from agency action could not be characterized as actions for "money damages" even if enforcement of a statutory mandate involved an order for the payment of money (*id.* at 892-910), and therefore, "[t]he District Court's jurisdiction to award relief in these cases is not barred by the possibility that a purely monetary judgment may be entered in the Claims Court." *Id.* at 910.[7]

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[7] The Court further explained that the assumption that the Court of Federal Claims' predecessor has exclusive jurisdiction over claims against the government for more than $10,000 is unsupported by the language of the Tucker Act:

> Rather, that court's jurisdiction is "exclusive" only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court. If, however, § 702 of the APA is construed to authorize a district court to grant monetary relief—other than traditional "money damages"—as an incident to the complete relief that is appropriate in the review of agency action, the fact that the purely monetary aspects of the case could have been decided in

Here, Congress has unquestionably granted the court of appeals jurisdiction to review and enforce DOE's compliance with the NWPA.[8] Moreover, the relief ordered by the court of appeals here does not involve money. Therefore, as in *Bowen*, there is no basis for the government's contention that the Tucker Act either expressly or impliedly prevented the court of appeals from granting the Utility Respondents full relief on their statutory claims under the NWPA, even if that relief affects the parties' rights under the Standard Contract. There is no reason for the Court to revisit the question that it answered in *Bowen*.

In an attempt to create a jurisdictional issue where none exists, the government mischaracterizes both the scope of the Tucker Act as governing any issue involving a government contract and the nature of the decision below as one involving a contract claim. The very cases upon which the government relies, however, confirm that federal courts other than the Court of Federal Claims have jurisdiction over statutory and constitutional claims "even when the claims depend on the existence and terms of a contract with the government." *Transohio*, 967 F.2d at 610; *Megapulse*, 672 F.2d at 971 (rejecting the government's argument that "agency action may not be enjoined, even if in clear violation of a specific statute, simply because that same action might also amount to a breach of contract"). As the court of appeals explained in *Megapulse*:

> [S]o long as an action brought against the United States or an agency thereof is not one that should

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> the Claims Court is not a sufficient reason to bar that aspect of the relief available in a district court.

487 U.S. at 910 n.48.

[8] Indeed, Congress has granted the courts of appeals original and *exclusive* jurisdiction "over any civil action" challenging an action or alleging a failure of DOE to act under the NWPA. 42 U.S.C. § 10139(a).

> be classified from the outset as a "contract action" for Tucker Act purposes, its remedies also are not contract-related, and the mere fact that an injunction would require the same governmental restraint that specific (non)performance might require in a contract setting is an insufficient basis to deny a district court the jurisdiction otherwise available and the remedial power otherwise appropriate.

Id.

The present action and *Indiana Michigan* are manifestly not "contract actions" within the scope of the Tucker Act. The Utility Respondents did not seek damages for breach of the Standard Contract, nor did they claim that DOE had violated their rights under the Standard Contract; instead, they filed a statutory enforcement action pursuant to the court of appeals' inherent jurisdiction to enforce its prior mandate and pursuant to its NWPA jurisdiction. The government, not the utilities, injected the Delays clause of the Standard Contract into the proceedings in an attempt to excuse DOE's failure to comply with its unconditional obligation and the court's mandate. *Megapulse,* 672 F.2d at 969. The fact that DOE's statutory obligation is reflected and incorporated in the Standard Contract did not transform this case into a contract action. On the contrary, because the Standard Contract itself is a creature of the NWPA, the court of appeals' consideration of DOE's attempt to apply the Unavoidable Delays clause in derogation of the statute was part and parcel of the court's NWPA and mandamus jurisdiction, just as the *Indiana Michigan* court's rejection of DOE's Final Interpretation of its statutory *and* contractual obligations was clearly within the court's NWPA jurisdiction.

The Utility Respondents likewise did not seek, and the court of appeals did not grant, any monetary or other relief under the Standard Contract. The court simply enjoined DOE from misapplying the Unavoidable Delays

provision of the Standard Contract in a way that contravened DOE's obligations under the NWPA. *See* Pet. App. 14a ("DOE has no authority to adopt a contract that violates the directives of Congress, just as it cannot implement interpretations of the contract that contravene this court's prior ruling."). Because the court of appeals clearly has jurisdiction to enforce DOE's statutory obligations, and because it is equally clear that the Court of Federal Claims has no such jurisdiction, the court of appeals acted well within its authority when it precluded DOE from violating the NWPA as construed in *Indiana Michigan*.

B. The Tucker Act Issue Presented by the Government is Not Ripe for Review

Even if there were some legitimate basis to suggest that the Tucker Act is implicated in the decision below—and there is not—review by this Court would not be appropriate at this time for three reasons. First, the question may well be rendered moot by the lower courts. As the government acknowledges, the utilities have already filed ten breach of contract actions in the Court of Federal Claims and have argued in those actions that the Delays clause is entirely inapplicable to their claims. Pet. at 26.[9] If the Court of Federal Claims and the Federal Circuit uphold the utilities' position on this issue, the jurisdictional question that the government attempts to raise here will be academic.

Second, the impact of the court of appeals' limited mandamus order on any contract claims against the government is far from clear. As the government recognizes (Pet. at 19 n.10), it is virtually certain that the Court of Federal

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[9] *See, e.g.*, Connecticut Yankee's Opp. To Motion to Dismiss and Cross-Motion for Summary Judgment on Contract Liability, filed July 2, 1998, *Connecticut Yankee Atomic Power Co. v. United States* (Fed. Cl.) (No. 98-154C). Although the government's petition says that eleven utilities have filed breach of contract actions, the Utility Respondents are aware of only ten such lawsuits.

Claims would give great weight, if not preclusive effect, to the D.C. Circuit's decision in *Indiana Michigan*, and its construction of that decision in the present proceedings, wholly apart from the limited mandamus order entered in the latter case. Thus, the government is essentially asking this Court for an advisory ruling on a jurisdictional issue that will have no practical effect in the ongoing contract litigation between the utilities and DOE. And regardless of whether it can assert an "unavoidability" defense, the government no doubt will raise a wide array of other defenses to the utilities' breach of contract claims, as it has already begun to do by moving to dismiss several of the pending actions for alleged failure to exhaust administrative remedies. Those defenses will be resolved in due course by the Court of Federal Claims and Federal Circuit.

Third, five utilities have commenced an action against DOE in the D.C. Circuit for injunctive relief and damages pursuant to that court's original and exclusive jurisdiction under Section 119(a) of the NWPA, 42 U.S.C. § 10139(a), over "any civil action" challenging DOE's action or inaction under the NWPA. *Consolidated Edison Co. of New York, Inc., et al. v. Department of Energy* (D.C. Cir.) (No. 98-1358). The petitioners there allege that the specific grant of jurisdiction in NWPA § 119(a) gives the courts of appeals exclusive jurisdiction over all challenges to DOE action or inaction under the NWPA, including claims for damages under the Standard Contract promulgated pursuant to the NWPA, and that this specific grant of jurisdiction repeals the general grant of jurisdiction in the Tucker Act. The D.C. Circuit was not called upon in either *Indiana Michigan* or the case below to consider the effect of the NWPA's broad jurisdictional grant to the courts of appeals on the Court of Federal Claims' jurisdiction under the Tucker Act. The court of appeals' disposition of the jurisdictional issue in *Consolidated Edison*, however, will consider the interplay

between NWPA § 119(a) and the Tucker Act, essentially the same quetion that the government seeks to present here. There is no reason for this Court to act at least until the lower court has had the opportunity to consider and rule on that question. *Tidewater Oil Co. v. United States,* 409 U.S. 151, 186-87 (1972) (Stewart, Rehnquist, and Douglas, JJ. dissenting) (lower court's consideration prior to Supreme Court review is advantageous because it permits the Court to exercise certiorari power informed by reasoning of appellate court); *see also Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 937 (1952) (Burton and Frankfurter, JJ. concurring).

III. THE PETITION DOES NOT PRESENT A QUESTION THAT WOULD RESOLVE THE PROBLEMS WITH THE NATION'S SNF DISPOSAL PROGRAM

The government contends that review by this Court is necessary "to rectify the unwarranted disruptive effect of the decision below on efforts to achieve safe and equitable resolution of the difficult nationwide problem of nuclear waste disposal." Pet. at 27. That claim is not only wrong but disingenuous. The disruption of efforts to achieve a safe and equitable resolution of the difficult nationwide problem of nuclear waste disposal has nothing whatsoever to do with the decision below. Rather, it is entirely the result of DOE's ongoing refusal even to begin to dispose of SNF as required by the NWPA. Despite two clear judicial affirmations of the January 1998 deadline, DOE has not deviated from the course set in its 1995 Final Interpretation to refuse to make any effort to dispose of SNF until a final repository is operable, which DOE estimates will not be until 2010 at the earliest. In the meantime, the customers of the nation's nuclear utilities must continue to pay billions of dollars for nothing, and the utilities are left to grapple for more than another decade with the problem of SNF storage that Congress instructed DOE to assume sixteen years ago. Unfortunately, neither the decision

below nor the purported jurisdictional issue that the government presents for review will have any impact on that problem.

There is equally little merit to the government's suggestion that this Court should reverse the limited mandamus relief granted by the court of appeals to protect the government from substantial damage awards for DOE's breach of contract. The government is no different from any private party in its contractual dealings; it may not hide behind its sovereign authority to avoid paying damages for breach of its contracts. *United States v. Winstar Corp.*, 518 U.S. 839 (1996). In any event, the court of appeals did not require the government to pay any damages to the utilities. The court simply held that *Indiana Michigan* precludes DOE from violating its NWPA-mandated obligation through misuse of a Standard Contract term.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 2, 1998